

SEP 27 1991

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No. 91-372

In The
Supreme Court of the United States

October Term, 1991

STATE OF GEORGIA,

Petitioner,

v.

THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM,
and ELLA HAMPTON McCOLLUM,

Respondents.

Petition For Writ Of Certiorari
To The Georgia Supreme Court

BRIEF OF THOMAS McCOLLUM AND
OTHER RESPONDENTS IN OPPOSITION

ROBERT H. REVELL, JR.
Attorney for Respondents
Counsel of Record

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QUESTION PRESENTED

Should this Court grant certiorari to review the Georgia Supreme Court's decision that the Georgia Constitution's guarantee of the right to an impartial trial does not preclude a criminal defendant from using his peremptory strikes in a racially discriminatory manner?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	2
1. NEITHER THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION NOR ART. 1, § 1, ¶ 11, TO THE GEORGIA CONSTITUTION PRO- HIBITS THE USE OF PEREMPTORY JURY STRIKES BY A CRIMINAL DEFENDANT IN A RACIALLY DISCRIMINATORY MANNER	2
2. THE LIMITED QUESTION CERTIFIED FOR DECISION BY THE GEORGIA SUPREME COURT WAS WHETHER THE GEORGIA CONSTITUTION'S GUARANTEE OF AN IMPARTIAL TRIAL PRECLUDED THE EXER- CISE OF PEREMPTORY STRIKES IN A RACIALLY DISCRIMINATORY MANNER AND THE DECISION OF SUCH COURT SHOULD NOT BE EXPANDED TO CONSIDER OTHER ISSUES BY GRANT OF WRIT OF CER- TIORARI IN THIS CASE.....	5
CONCLUSION	6
APPENDIX 1	App. 1
APPENDIX 2	App. 2
APPENDIX 3	App. 3

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	3
<i>Edmonson v. Leesville Concrete Company, Inc.</i> , 500 U.S. ___, 114 L.Ed.2d 660, 111 S.Ct. ___ (1991)	3
<i>Holland v. Illinois</i> , 493 U.S. ___, 107 L.Ed.2d 905, 110 S.Ct. 803 (1990)	2, 4
<i>Powers v. Ohio</i> , 499 U.S. ___, 113 L.Ed.2d 411, 111 S.Ct. 1364 (1991).....	1, 3
CONSTITUTION:	
GA. CONST., Art. 1, § 1, ¶ 11	2, 3
U.S. CONST., AMENDMENT VI	2, 3, 4

STATEMENT OF THE CASE

This case is one in which no trial has taken place and thus no jury has been selected.

The McCollums were indicted on August 10, 1990, on several counts as a result of an altercation in their dry cleaning business in Dougherty County, Georgia.

The district attorney of the Dougherty Judicial Circuit disqualified himself, and an attorney was designated acting district attorney thereafter. He in turn disqualified himself, and the Office of the Attorney General of the State of Georgia assumed responsibility for the prosecution of this case.

The attorney general filed a pre-trial motion asking that the trial court prohibit the McCollums from using their peremptory strikes to exclude black jurors. The victims were black and the defendants were white. Elements of racism were injected into the case by virtue of a petition widely circulated throughout the black community (part of the record below, see *Appendix 3*). *Powers v. Ohio*, 499 U.S. ___, ___, 113 L.Ed.2d 411 at 420, 111 S.Ct. 1364, ___ (1991). The attorney general speculated or conjectured that defendants would use their statutory peremptory strikes to excuse all of the black jurors from the jury panel.

The pre-trial motion was denied. The question was certified for appeal. The attorney general made an application to the Georgia Supreme Court for interlocutory appeal, which was unanimously granted on November 15, 1990.

The Georgia Supreme Court, in a 4-3 decision, without elaboration, declined to diminish the free exercise of peremptory strikes by a criminal defendant.

SUMMARY OF ARGUMENT

The Georgia Supreme Court in its grant of interlocutory appeal set forth the limited question of whether the Georgia Constitution's guarantee of the right to an impartial trial precludes a criminal defendant from using his peremptory strikes in a racially discriminatory manner. The opinion of this Court in *Holland v. Illinois*, 493 U.S. ___, 107 L.Ed.2d 905, 110 S.Ct. 803 (1990), is persuasive authority that the Georgia Supreme Court correctly answered this question in the negative.

No issue of a violation of the Equal Protection Clause of the Fourteenth Amendment was claimed in the court below and therefore should not be brought before this Court for consideration by petition for writ of certiorari.

ARGUMENT

1. **NEITHER THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION NOR ART. 1, § 1, ¶ 11, TO THE GEORGIA CONSTITUTION PROHIBITS THE USE OF PEREMPTORY JURY STRIKES BY A CRIMINAL DEFENDANT IN A RACIALLY DISCRIMINATORY MANNER**

The petition for writ of certiorari in this case seeks to have the decision of the Georgia Supreme Court reversed

in order to have the holdings of the cases of *Batson v. Kentucky*, 476 U.S. 79 (1986), *Powers v. Ohio*, 499 U.S. ___, 113 L.Ed.2d 411, 111 S.Ct. 1364 (1991), and *Edmonson v. Leesville Concrete Company, Inc.*, 500 U.S. ___, 114 L.Ed.2d 660, 111 S.Ct. ___ (1991), extended to preclude the McCollums at the trial of this case from the unfettered use of their peremptory strikes if such strikes result in the excusal of black trial jurors based on race.

In granting the application for interlocutory appeal, the Georgia Supreme Court set forth the following limited question to be decided in that appeal:

Whether the Georgia Constitution's guarantee of the right to impartial trial precludes a criminal defendant from using his peremptory strikes in a racially discriminatory manner. (See *Appendices 1 and 2*)

The Georgia guarantee of an impartial trial is embodied at Art. 1, § 1, ¶ 11 of the Georgia Constitution: "... In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; . . . "

The federal Sixth Amendment right to jury trial is as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . .

The question certified for appeal by the Georgia Supreme Court was thus limited to the application of Art. 1, § 1, ¶ 11 of the Georgia Constitution to constitutionally

preclude a criminal defendant from exercising peremptory strikes in a racially discriminatory manner.

Since the guarantee of an impartial trial under the Georgia Constitution is virtually identical to the same guarantee under the Sixth Amendment to the federal Constitution, the case of *Holland v. Illinois*, 493 U.S. ___, 107 L.Ed.2d 905, 110 S.Ct. 803 (1990), is persuasive authority that the limited question presented to the Georgia Supreme Court has been correctly answered in the negative.

In that case this Court held that the prosecution's use of peremptory strikes against black jurors did not deprive a white defendant of his Sixth Amendment right to an impartial jury. No equal protection claim was made in that case. This Court held as follows:

" . . . All we hold is that he does not have a valid constitutional challenge based on the 6th Amendment - which no more forbids the prosecutor to strike jurors on the basis of race than it forbids him to strike them on the basis of innumerable other general characteristics . . .

Since only the Sixth Amendment claim and not the equal protection claim is at issue, the question before us is not whether the defendant has been unlawfully discriminated against because he was white, or whether the excluded jurors have been unlawfully discriminated against because they were black, but whether the defendant has been denied the right to a trial by an impartial jury." 107 L.Ed.2d at 905.

2. THE LIMITED QUESTION CERTIFIED FOR DECISION BY THE GEORGIA SUPREME COURT WAS WHETHER THE GEORGIA CONSTITUTION'S GUARANTEE OF AN IMPARTIAL TRIAL PRECLUDED THE EXERCISE OF PEREMPTORY STRIKES IN A RACIALLY DISCRIMINATORY MANNER AND THE DECISION OF SUCH COURT SHOULD NOT BE EXPANDED TO CONSIDER OTHER ISSUES BY GRANT OF WRIT OF CERTIORARI IN THIS CASE

The attorney general neither raised on application for interlocutory appeal nor in brief and argument before the Georgia Supreme Court the question which it *now* seeks to have this court decide on appeal: Whether the application of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution precludes a criminal defendant from the exercise of peremptory strikes in a racially discriminatory manner because such action by the criminal defense attorney constitutes state action and offends the equal protection rights of the excluded jurors. Not until the decision was pending and the attorney general submitted his first and second supplementary briefs was the application of the Equal Protection Clause raised.

The issue which the Georgia Supreme Court had before it in the underlying case, as stated in the application for interlocutory appeal, was based upon a claim of violation of the Georgia Constitution's guarantee to an impartial trial and was not based upon an equal protection claim. This court should not now consider the equal protection claim on appeal when the same was not raised in the court below.

—————◆—————

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari to review the decision of the Georgia Supreme Court should be denied.

Respectfully submitted,

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App. 1

APPENDIX

(SEAL)

SUPREME COURT
STATE OF GEORGIA
STATE JUDICIAL BUILDING
Atlanta 30334

HAROLD G. CLARKE, CHIEF JUSTICE
GEORGE T. SMITH, PRESIDING JUSTICE
CHARLES L. WELTNER

RICHARD BELL

WILLIS B. HUNT, JR.

ROBERT BENHAM

NORMAN S. FLETCHER
JUSTICES

JOLINE B. WILLIAMS,
CLERK

WM. SCOTT HENWOOD,
REPORTER

NOV 15 1990

TO ALL COUNSEL:

RE: Application No. S91I0118, State of Georgia v. Thomas McCollum, et al.

The Court today granted this application for interlocutory appeal. All the Justices concur.

Your notice of appeal must be filed in the trial court within 10 days from this date. When the record is received from the trial court and docketed in this court you will be sent a docketing notice showing the date of docketing and the Case Number assigned. The appellant's enumeration of errors and briefs will be due in this Court within 20 days from the date of docketing; the appellee's briefs will be due within 40 days from the date of docketing or within 20 days after the appellant's briefs are filed, whichever is later.

App. 2

The Court is particularly concerned with, and requests that you address in your briefs, the following:

Whether the Georgia Constitution's guarantee of the right to impartial trial precludes a criminal defendant from using his peremptory strikes in a racially discriminatory manner.

Joline B. Williams, Clerk
BY Lynn M. Hogg

App. 3

"KEEP THE DREAM ALIVE"

Dr. Martin Luther King taught that "non-violence" is the way to peace.

BE INFORMED . . . The McCollum Family, owners of McCollum's Dry Cleaners located at 1703 E. Broad Ave. in Albany attacked, kicked and beat a young black woman and her husband with a baseball bat, several days ago as they attempted to pick up clothing and dry cleaning.

This Community must respond to this violent act with "non-violence" & direct action. *We urge you to select another Dry Cleaners for your clothing.*

The McCollums have *no respect* for your black sister & brother, your daughter & son, your wife & husband. Spend your money with people who respect you.

Select another cleaners for your clothing!

1-15-90

Unity Community of Albany
Rep. John White, Chairman
